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No. 1188

In the Supreme Court of the United States

October Term, 1944.

SUNRAY OIL COMPANY, *Petitioner,*

vs.

COMMISSIONER OF INTERNAL REVENUE.

Petition for Writ of Certiorari, and Brief in Support Thereof.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1944.

No. .....

SUNRAY OIL COMPANY, *Petitioner,*
vs.
COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Sunray Oil Company prays that a writ of *certiorari* issue to revise the judgment of the Circuit Court of Appeals for the Tenth Circuit, entered in the above case on February 21, 1945, affirming the decision of the Tax Court of the United States.

Opinions Below.

The opinion of the Tax Court (R. 100) is reported in 3 T. C. 251. The opinion of the Circuit Court of Appeals (R. 227) is not yet reported.

Summary and Short Statement of Matters Involved.

The Commissioner of Internal Revenue determined deficiencies in petitioner's federal income taxes for the years 1936, 1937, 1938, and 1939, based on two questions here in controversy.

(1) The Commissioner included in petitioner's gross income subject to tax, income received by petitioner from the sale of oil and gas produced from wells upon lands owned by the State of Oklahoma and leased to petitioner, said lands being dedicated to, and used exclusively and solely for, governmental purposes of the State of Oklahoma. (See Appendix B, *infra*, p. 17)

(2) The Commissioner refused to exclude from petitioner's sales of oil and gas the cost of oil and gas purchased by petitioner from lessors of oil and gas properties represented by the advance payments made therefor by petitioner as lessee to the lessors of such property, contrary to the provisions of Article 22(a)-5 of Treasury Regulations 94, 101, and 103 (19.22(a)-5.)

The Tax Court and the Circuit Court of Appeals sustained the Commissioner's determination on both these points.

The two questions for consideration by the United States Supreme Court are hereby presented.

(1) Whether petitioner is entitled to exemption from federal income, taxes, up to March 7, 1938, of its portion of the income from oil and gas leases on State-owned lands, upon the ground that the decision in *Helvering* v. *Mountain Producers Corporation*, 303 U. S. 376, should, as to petitioner, be given a prospective application only, thereby relieving petitioner from undue hardship and injustice.

(2) Whether the part of the lease bonuses or advance royalties paid by the petitioner as lessee to lessors of oil and gas properties, who retained an economic interest in the oil and gas in place, represented cost to the petitioner of oil and gas purchased from the lessors' retained share in current production, which should be excluded or eliminated from gross sales in determining gross income as provided in Art. 22(a)-5 of Regulations 94, 101 and 103 (19.22(a)-5.)

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 21, 1945 (R. 227). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statutes Involved.

The statutes and regulations involved are set forth in Appendix A, *infra*, p. 17.

Specification of Errors to Be Urged.

(1) The Circuit Court of Appeals erred in holding, in effect, that the *Mountain Producers Corporation* case must be given retrospective application as to this petitioner.

(2) The Circuit Court of Appeals erred in holding that where petitioner as lessee paid bonuses or advance royalties to lessors "for oil and gas to be extracted," the lessors retaining an economic interest in oil and gas in place, petitioner could not exclude from the amounts received by it from the sale of oil and gas produced under such leases the portion of such bonus or advance royalties allocable to current production of "such oil and gas to be extracted" as the cost to petitioner of such oil and gas; and erred in holding that petitioner could recover its cost of such oil and gas only through deductions for depletion.

Reasons for Granting Writ.

(1) The proposition that the decisions of the Supreme Court of the United States may or should be given a prospective effect when injustice and undue hardship will thereby be avoided, has never been decided by this Court. The effect of the decision by the Circuit Court of Appeals of the Tenth Circuit, sought herein to be reviewed, is against this proposition. The decision of the United States Court of Appeals of the District of Columbia in *Warring* v. *Colpoys*, 122 F. (2d) 642, 646, is that a decision of the Supreme Court may be applied prospectively, and was a proper consideration for the Circuit Court.

(2) The decision of the Circuit Court of Appeals that bonuses or advance royalties paid by the lessee constitute an investment by the lessee in a depletable economic interest in the oil and gas property and not the purchase price of oil and gas reserved by the lessor, is in direct conflict with principles established by decisions of the Supreme Court in *Burnet* v. *Harmel*, 287 U. S. 103; *Helvering* v. *Twin Bell Oil Syndicate*, 293 U. S. 312; *Herring* v. *Commissioner*, 293 U.

S. 322; and *Douglass* v. *Commissioner,* 322 U. S. 275. The Supreme Court in those cases decided, in so far as the lessor is concerned, that a payment as bonus or advance royalty is "payment for the oil and gas to be extracted"; that said payments made by the lessee to the lessor are ordinary income to the lessor and not proceeds of a sale of capital investment; and that the lessor is entitled to depletion on said bonus or advance royalty because this constitutes part of the lessor's share of the "gross income from the property." The Supreme Court has not directly dealt with the status for tax purposes of such bonuses or advance royalties from the standpoint of the lessee.

Conclusion.

The questions involved are both of great public importance in the administration of the Revenue Acts. The conclusions reached by the Circuit Court of Appeals conflict in vital respects with several decisions of this Court, and we think are in conflict with the decisions of other Circuit Courts of Appeals.

It is, therefore, respectfully submitted that the petition be granted.

.....,

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BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*.

I.

Opinions of the Courts Below.

The written opinion of the United States Tax Court appears in the record at page 100. The opinion of the Circuit Court of Appeals appears in the record beginning at page 227, but is not officially reported.

II.

Jurisdiction of This Court.

The grounds of jurisdiction of this Court were stated in the petition for writ of *certiorari*.

III.

Statement of the Case.

This has been sufficiently covered in the petition for writ of *certiorari* and in the interest of brevity is not repeated here.

IV.

Specification of Errors.

The Circuit Court erred as follows:

(1) In failing to give effect to the rule that an overruling decision may be given prospective effect when contracts have been made in reliance upon the overruled decisions, when undue hardship and injustice will thereby be avoided.

(2) In failing to allow subtraction by petitioner, from the amounts received by it from the sale of oil and gas purchased from the lessor by payment of bonuses or advance royalties, of the portion of such bonuses or advance royalties allocable to current production which represent the cost to petitioner of such oil and gas.

ARGUMENT.

Following is a summary of the points which will be argued:

(1) Under the undisputed facts in this case, as shown by the record, injustice and hardship will result to petitioner by refusal to allow exemption from federal income taxation of the income prior to March 7, 1938, from oil and gas leases upon State owned lands, and for that reason the decision of *Helvering* v. *Mountain Producers Corporation* should be applied as to petitioner prospectively only.

(2) Petitioner is entitled under Article 22(a)-5 of Treasury Regulations 94, 101 and 103 (19.22(a)-5) to subtract from the amounts received by it from the sale of oil and gas purchased from the lessor by the payment of bonuses or advance royalties, the portion of such bonuses or advance royalties allocable to current production which represent the cost to petitioner of such oil and gas. Petitioner is not permitted or required to recover the cost of such purchased oil and gas through deductions for depletion.

Point One.

Under the undisputed facts in this case, as shown by the record, injustice and hardship will result to petitioner by refusal to allow exemption from federal income taxation of the income prior to March 7, 1938, from oil and gas leases upon State owned lands, and for that reason the decision of *Helvering* v. *Mountain Producers Corporation* should be applied as to petitioner prospectively only.

This proposition was, we believe, fairly presented to the Circuit Court of Appeals for the Tenth Circuit, both in the briefs and oral arguments.[1] The Commissioner un-

1. Petitioner sets out in its brief filed below that, "Petitioner made and entered into the lease contracts in reliance upon the interpretation of the Constitution of the United States in full force and effect at the

derstood clearly that our contention was as above set out.[2] The Circuit Court states that the contention of petitioner is that the case of *Helvering* v. *Mountain Producers Corporation*, 303 U. S. 376, should not be given retrospective application. (R. 228)

The property from which the income claimed to be exempt from federal income taxation arose was land owned by the State of Oklahoma, dedicated to, used exclusively for, and devoted to, strictly and only, state and governmental purposes, for the sole use and benefit of the sovereign State of Oklahoma (R. 112 and Appendix B, *infra*, p. 17), thereby bringing it squarely within the principle of constitutional exemption from taxation, as determined by the United States Supreme Court in the case of *Burnet* v. *Coronado Oil and Gas Company*, 285 U. S. 393, and *Gillespie* v. *Oklahoma*, 257 U. S. 501, and it is contended by petitioner that the lease contracts thereon, under which the income is produced, were made specifically by petitioner in reliance upon the interpretation of the Constitution of the United States, as shown by said decisions.

Petitioner contends that to refuse exemption of such income would produce injustice and undue hardship to petitioner; that petitioner specifically relied upon the law as it was then interpreted by the Supreme Court. The evidence is conclusive and undisputed, that petitioner relied upon the law as then announced by this Court, and that said contracts

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time and its property rights vested thereby are involved, and to compel it to pay said taxes would produce injustice and undue hardship. The case of *Helvering* v. *Mountain Producers Corporation*, 303 U. S. 376, 82 L. ed. 907, made a new rule of law and a new interpretation of the Constitution of the United States; such new rule and new interpretation has prospective but not retroactive effect under the circumstances shown in evidence."

2. Respondent set out in its brief below that, "The taxpayer asserts, however, that this Court should limit the effect of the Supreme Court decision to the period after the date of decision, March 7, 1938." "If the decision of the Supreme Court can be so limited by judicial action, however, it must be by action of the Supreme Court itself, not of a Circuit Court of Appeals."

of leases would not have been made except for the reliance upon the law as then stated by this Court. (R. 112-114) Petitioner did contract and acquire property rights in reliance upon the interpretation of the Constitution of the United States, and that petitioner, under the facts in this case, is entitled to have the *Mountain Producers Corporation* case applied prospectively, from and including the 7th day of March, 1938, the date the *Mountain Producers* case was decided.

This Court said in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 277 U. S. 358, that the state courts had the right to say that decisions of its highest court, though later overruled, are law nonetheless for immediate transactions wherever undue injustice or hardship will thereby be averted.

There are a few reported cases in the lower state courts relating to tax action where it was strongly suggested that, if contracts were made or entered into in reliance upon a decision of the Supreme Court of the United States later overthrown by that court, the later decision would be given only a prospective effect.[3]

We think the Circuit Court's failure to apply the *Mountain Producers* case, *supra*, prospectively, is in conflict with the basis of the decision of the Circuit Court of Appeals of the District of Columbia in the case of *Warring* v. *Colpoys*, 122 F. (2d) 642, 646, where that Circuit Court said:

> "It has been commonly thought that if an act is declared unconstitutional, it never had any force or effect. Yet a realistic approach is eroding this doctrine. In the instant case the reason why it is considered that appellant may be entitled to discharge is because the statute never gave the court contempt 'jurisdiction' over his type of offense. Yet the courts had said there

3. People, ex rel., v. Graves, (N. Y.) 273 N. Y. S. 582; Laabs v. Wisconsin Tax Commissioner, (Wis.) 261 N. W. 404.

was jurisdiction. It is now said that there is no jurisdiction.

"But to say that there never was jurisdiction is to place the *Nye* case on a higher plane than, for example, the *Toledo* decision. True the *Nye* case is the law now and will be followed until changed. But the Supreme Court's construction had been otherwise. Those decisions that made it otherwise were on the same plane as in the *Nye* case. All of the decisions were construing the statute. When a statute is declared unconstitutional it falls because it must yield to the basic, superior law. There is much more reason to argue that the unconstitutional statute never was the law. Yet today even such a statute is an operative fact and decisions made under its colors have the blessing of *res judicata.*

"All of the loose ends presented in this discussion on the effect of altering the law can be pretty well tied together when it is realized that law is not a pure science, that law loses its vital meaning if it is not correlated to the organic society in which it lives, that law is a present and prospective force, that law needs some stability of administration, that the law is all the law there is, that law is more for the parties than for the courts, that people will rely upon and adjust their behavior in accordance with all the law be it legislative or judicial or both.

"The Supreme Court in the *Nye* case applied its new law to the litigation then before it. Inasmuch as personal liberty was involved and the courts usually apply law this much after the fact, such a result was meritorious. But the court did not indicate whether its new law was to be applied to cases decided under the old law previous to its decision. That question is now for us, another court.

"The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939."

We think that the decision of the Circuit Court of Appeals, in its decision in the instant case, was tantamount

to a holding that the Circuit Court could not apply the *Mountain Producers* decision prospectively as to the petitioner. This holding would be in conflict with the holding of the Circuit Court of Appeals of the District of Columbia in the case of *Warring* v. *Colpoys, supra.*

We submit that under the decisions to which reference has been made, and in consideration of the undisputed facts in the case at bar, petitioner is entitled to have this Court determine whether or not it is entitled to have the *Mountain Producers* case applied to it prospectively from and including March 7, 1938, and that the writ of *certiorari* should be granted on this point.

POINT TWO.

Petitioner is entitled under Article 22(a)-5 of Treasury Regulations 94, 101 and 103 (19.22(a)-5) to subtract from the amounts received by it from the sale of oil and gas purchased from the lessor by the payment of bonuses or advance royalties, the portion of such bonuses or advance royalties allocable to current production which represent the cost to petitioner of such oil and gas. Petitioner is not permitted or required to recover the cost of such purchased oil and gas through deductions for depletion.

The Circuit Court of Appeals erred in holding that bonus or advance royalties paid by petitioner to lessors retaining an economic interest in the oil and gas in place represented "a capital expenditure," (R., p. 233-234) recoverable only through allowances for depletion. Under controlling decisions of this Court, it is clear that bonuses and advance royalties paid by a lessee are not the purchase price of a depletable economic interest in the oil and gas in place but represent the purchase price paid in advance for a share of the oil and gas reserved by the lessor.[4] The por-

4. Burnet v. Harmel, 287 U. S. 103;
Herring v. Commissioner, 293 U. S. 322;
Anderson v. Helvering, 310 U. S. 404;
Douglass v. Commissioner, 322 U. S. 275.

tion of such payments allocable to current production represents the purchase price paid by the lessee for oil and gas produced from the lessor's economic interest and is,[5] therefore, cost of goods sold which must be subtracted or excluded from gross sales to determine gross income of the lessee (Art. 22(a)-5, Treasury Regulations 94, 101 and 103 (19.22(a)-5).

The principle that a bonus or advance royalty paid to a lessor retaining a right to current royalties is not the purchase price of a depletable economic interest in the oil and gas in place, is firmly established by decisions of this Court dealing with the status of such advance royalties in the hands of the lessor receiving them. Although this Court has not dealt specifically with the status of such payments from the standpoint of the lessee, we earnestly insist that the principle established by this Court's decisions are fully applicable in determining the status of such payments from the standpoint of the lessee.

In *Burnet* v. *Harmel,* 287 U. S. 103, the court held that a lessor receiving such a bonus or advance royalty was not making a sale of an interest in the property, but that the amounts received by the lessor were ordinary income and not proceeds from the sale of a capital asset. There the court said:

> "Bonuses and royalties are both consideration for the lease and are income of the lessor."

Consistently with this decision, this Court subsequently held that since the lessor had not received the bonus as the proceeds from the sale of property, but had merely received a payment in advance for oil and gas to be extracted, the lessor was entitled to percentage depletion with respect to such advance royalties in the year received, even though

5. Burnet v. Harmel, 287 U. S. 103;
Herring v. Commissioner, 293 U. S. 322.

there was no production from the property in that year. *Herring* v. *Commissioner,* 293 U. S. 322. The court there said:

> "A bonus is not the proceeds from the sale of property, but payment in advance for oil and gas to be extracted and is therefore taxable income. As such it is part of the 'gross income from the property' as that phrase is used in Section 204 (c) to designate the base for the application of the percentage deduction."

In *Anderson* v. *Helvering,* 310 U. S. 404, the court said:

> "It is settled that the same basic issue determines both to whom income derived from the production of oil and gas is taxable and to whom a deduction for depletion is allowable. The issue is who has a capital investment in the oil and gas in place and what is the extent of his interest."

The court further said:

> "The holder of a royalty interest—that is, a right to receive a specified percentage of all oil and gas produced during the term of the lease—is deemed to have 'an economic interest' in the oil in place which is depleted by severance. * * * Cash bonus payments when included in a royalty lease, are regarded as advance royalties, and are given the same tax consequences."

In *Douglass* v. *Commissioner,* 322 U. S. 275, the court said:

> "Royalty or bonus payments, in advance of actual extraction of minerals, are, like sales after severance or royalty payments on actual production gross income and not a recovery of capital."

These decisions necessarily establish, we submit, that bonuses or advance royalties do not represent an investment by the lessee in a depletable economic interest in oil and gas in place recoverable through deductions for depletion, but are advance payments by the lessee of the purchase price of future production belonging to the lessor. This Court has directly held that the depletable economic

interest in the oil and gas in place, production from which is purchased by the advance royalties, belongs to the lessor; that therefore the lessor is entitled to depletion deductions with respect to this interest, and that where percentage depletion is involved, the lessor receives the advance royalty as a part of his "gross income from the property." This being so, how can it also be true that the portion of the subsequent actual production paid for by the advance royalties represents gross income from a depletable interest belonging to the lessee? The economic interest from which this gross income arose could not be owned both by the lessor and the lessee.

In the instant case the court below wholly overlooked the fact that depletion had already been allowed to the lessor for the identical item which it holds lessee is now entitled to receive. If lessee were to take depletion, as held by the Circuit Court, on that portion of the gross receipts from the property belonging to someone else, the lessor, it would be double depletion allowance, and this cannot be done.[6]

Consistently with the decisions of this Court, it is petitioner's position that the advance royalty, like the current royalty, is an amount paid by the lessee to the lessor for part of the lessor's reserved share of production; that such oil and gas when produced became the property of the lessee only because the lessee had bought and paid for it in advance and not because it was produced from a depletable economic interest in oil and gas in place owned by the lessee.

In such leases the lessor reserves two interests in the oil and gas in place—that represented by the current royalty and that represented by the advance royalty. The production from both of these interests represents the lessor's

6. Helvering v. Twin Bell Oil Syndicate, 293 U. S. 312.

"gross income from the property" with respect to which the lessor only was entitled to depletion deductions, based either on cost or on a percentage of gross income. The production attributable to lessee's interest in the oil and gas in place was therefore only that portion of the production remaining *after excluding the current production attributable to the interests reserved by the lessor both as to the advance royalty and the current royalty.* The decision of the court below in accordance with applicable regulations (Article 23(m)-1(g), Regulations 94 and 101) holds that petitioner-lessee was entitled to depletion only in respect of that portion of the production remaining after excluding that allocable to current royalties and that allocable to the advance royalties. Both of these amounts were deducted or excluded in the computation upon which petitioner's depletion allowance was based.

The court, however, in deciding that the amount allocable to advance royalties did not represent the petitioner's cost of goods sold, proceeded upon the utterly inconsistent theory that advance royalties represented the cost to petitioner of a depletable economic interest in the oil and gas property, recoverable only through depletion allowances. In so doing, the court took a position wholly inconsistent with the decisions of this Court as to the status of advance royalties in the hands of the lessee. It also took a position wholly inconsistent with its holding in the opinion in this very case that a lessee is not entitled to depletion, computed on the percentage basis, with respect to the current production allocable to advanced royalties because the lessor was entitled to that depletion, *i. e.*, because the lessor was the owner of this depletable economic interest in the property.

The decision of the court below is, therefore, erroneous in refusing to recognize that the portions of advance royalties allocable to current production represent amounts paid in advance by the lessee to the lessor as the purchase price

of oil and gas produced from a depletable economic interest reserved by the lessor, and hence that such amounts are part of the lessee's cost of goods sold.

It is clear that other Circuit Courts do not agree with the decision of the Circuit Court in the instant case, to the effect that a lessee purchasing oil and gas by bonus or advance payments can obtain a return of its cost by depletion; for example, in the recent case of *Commissioner of Internal Revenue* v. *Kirby Petroleum Co.*, March 5, 1945, not yet officially reported, the United States Circuit Court of Appeals for the Fifth Circuit said:

> "To the extent of the cash bonus and the right to royalty payment, it (the lessor)* retained a proportionate economic interest in the oil and gas in place and to that extent *the lessee* did not acquire a depletable interest."

The writ of *certiorari* should be granted because the decision below is in conflict with principles established by decisions of this Court. The question involved as to the tax status of advance royalties to the lessee has not been directly decided by this Court. The question is a very important one in its effect on the oil and gas producing industry. It is of great importance to the taxing officials in the administration of the law and is involved in other cases now pending in the Federal courts. The situation is, therefore, such as to justify the granting of the writ of *certiorari* on this point.

Conclusion.

Petitioner, therefore, respectfully prays that the Court grant the petition for writ of *certiorari*, and that upon reconsideration by this Court, petitioner be allowed to deduct from its taxable income that portion of the income received

(*Parentheses supplied for clarity and italics for emphasis.)

from the State-owned lands, prior to March 7, 1938, and that it be permitted to subtract from gross income the cost of the oil and gas represented by the bonus or advance payments made to the lessor.

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Appendix A.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

"Sec. 22. *Gross Income.* (a) General Definition. 'Gross income' includes gains, profits, and income derived * * * dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever."

The above provisions of the Revenue Act of 1936 are embodied in identical form in the Revenue Act of 1938 and in the Internal Revenue Code.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

"Art. 22(a)-5. *Gross Income from Business.* In the case of a manufacturing, merchandising, or mining business 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold. But see Article 23-(m)-1(g)."

Identical provisions are embodied in Article 22(a)-5 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, and Section 19.22 (a)-5 in Treasury Regulations 103.

Appendix B.

The "Enabling Act" of Congress of June 16, 1906, 34 U. S. St. at Large, pp. 267-278, for the admission of Oklahoma and Indian Territory as a state, provided in Section 2: "The capital of said state shall temporarily be at the City of Guthrie, in the present Territory of Oklahoma, and shall not be changed therefrom previous to *anno domini*

nineteen hundred and thirteen, but said capital shall after said year be located by the electors of said State at an election to be provided for by the Legislature; *provided, however,* that the Legislature of said State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any monies of the State for the erection of buildings for capitol purposes during said period."

The Legislature, by Concurrent Resolution No. 8 (Session Laws of Oklahoma 1910-11, pp. 9-17) on December 15, 1910, accepted the proposition of certain citizens set out in said Resolution, whereby it was agreed that the permanent capital and seat of government of the State of Oklahoma was to be located at Oklahoma City, and the Capitol Building and Executive Mansion erected therein; and that the State Capitol Building Company to be organized by such citizens should secure title to six hundred and fifty acres of land adjacent to or in the immediate vicinity of the State Capitol location, the proceeds "to be held in trust for said State of Oklahoma" to be "paid to said State to meet the expenses and bills incurred in the erection of said Capitol Building."

The Legislature of the State of Oklahoma at its extraordinary session held in November and December, 1910, by Chapter 5, Session Laws 1910-1911, pp. 4-7 (73 Okl. St. Ann., Chap. 1), with emergency clause approved December 29, 1910, provided: "The seat of government and capital of the State of Oklahoma shall be and is hereby established at Oklahoma City, in the County of Oklahoma, in said State;" directed that the permanent capitol shall be erected where the same now exists, and "the Executive Mansion shall be located in the vicinity of said capitol grounds on a site consisting of one-half block, the same to be selected by the Capitol Commission." By this Act, the Governor was empowered to make all necessary contracts on behalf of the State in order to secure by gifts or donations the proceeds of the sale of land from any person, firm or corporation, for the purpose of creating a fund to be known as the "State Capitol Fund." This action, though contrary to the provisions of the "Enabling Act," was sustained by the Su-

preme Court of the United States in the case of *Coyle* v. *Smith, Secretary of the State of Oklahoma,* 55 U. S. L. ed. 853.

By Chapter 6, Session Laws of Oklahoma 1910-1911, pp. 7-8, approved December 29, 1910, the Legislature provided:

> "The Governor is hereby authorized and empowered to accept on behalf of the State a gift or donation of not less than fifteen acres as a site for the State Capitol, same being particularly described as follows:
>
> Fifteen acres of land surrounding a point on the half section line running north and south between the northeast fourth and the northwest fourth of section twenty-seven, township twelve north, range three west of the Indian Meridian * * *; the Governor is further authorized and empowered to accept on behalf of the state one-half block to be used for Executive Mansion, and the Executive Mansion shall be located in the vicinity of said capitol grounds * * *."

On March 15, 1913, the Legislature of the State of Oklahoma, by Joint Resolution No. 7 (Session Laws of Oklahoma 1913, pp. 264-268) provided in part, in response to a proposal therein recited by certain citizens of Oklahoma City "as an adjustment of the State Capitol matter" that the State accept the free capitol site and free site for the Executive Mansion, certain cash, and "the 650 acres of land, deeds to which are now in the hands of said Lee Cruce (then governor), as trustee, less the said capitol site and site for the Executive Mansion."

> "*Section 1.* That in lieu of all pending and proposed contracts relating or in any way referring to the location, construction and erection of a State Capitol building, the proposition herein made by the residents and citizens of Oklahoma City, be accepted; * * *
>
> "*Section 3.* That the title to the said free Capitol site and the site for the Executive Mansion, be accepted by the Governor on behalf of the State, and the title to the said 650 acres of land, less said Capitol and Executive Mansion sites, be accepted on the part of the State by the Commissioners of the Land Office, and said lands

when so accepted, shall thereafter be designated, known and become capitol building lands, and shall thereafter be managed by the Commissioners of the Land Office as other public building lands."

As shown by the record in this case (pp. 121-123, 128-143) the property involved in this case, upon which the state granted oil and gas leases, was conveyed by land owners to the State Capitol Building Company and by that company deeded to the State of Oklahoma, and comprised a portion of the 650 acres of land "designated, known and become Capitol Building lands." The acceptance for and on behalf of the State of Oklahoma by the Commissioners of the Land Office, identifying the same under Joint Resolution No. 7, Oklahoma Session Laws 1913, is shown by Exhibit 7 (R. 140).

That part of the land, including the west half of the land on which the Capitol Building is located and the approaches thereto, and all land west thereof (shown on Exhibits 1-2 as Tracts 5, 6, 7, 8 and 9; R. 119) was obtained by deed which provided that "This conveyance to be delivered and become effective only upon the further condition that, and after, the Act of the Legislature passed extraordinary session held in Oklahoma City, Oklahoma, in the month of December, A. D. 1910, shall have been declared legal and constitutional by the Supreme Court of the United States." (Exhibit 3, R. 122.) The Act referred to was that shown as chapter 5, pp. 4-7, Session Laws of Oklahoma 1910-1911. It will be observed from Exhibit 3 (R. 121) that it was provided that seven and one-half acres of this land was for the permanent location and maintenance of the Capitol Building of the State of Oklahoma, and "provided further, that if such Capitol Building or Capitol Grounds shall at any time cease to be used for capitol purposes, all right, title and interest in and to said parcel of land and all appurtenances thereunto belonging shall revert to grantors, their heirs and assigns forever."

That portion of the land, tract 11 and the west half of the Parkway and Boulevard, shown on Exhibits 1-2 (R. 119) was obtained by condemnation (R. 123) under authority of chapter 298, Session Laws of Oklahoma 1919

(Session Laws of Oklahoma 1919, p. 435), providing for the purchase or condemnation of additional land adjacent to or in the vicinity of the State Capitol Building and grounds and of beautifying the street known as Lincoln Boulevard leading from the Capitol to the intersection of Sixteenth Street, etc.

That portion of the Capitol Building Grounds east and south of the site of the Capitol Building (and including the east half of such site and the east half of Lincoln Boulevard), was obtained by the State Capitol Building Company by two deeds shown as Exhibits 5 and 6 (R. 128-131). The deed, Exhibit 5, also provides that "should at any time the Capitol site be changed or removed the 7½ acre site herein donated for Capitol Grounds, together with all improvements thereon shall revert to the grantors herein, their heirs and assigns."

That portion of the Capitol Building Grounds upon which are located the University Hospital, the State Medical School and the Crippled Children's Hospital as shown on Exhibit 1-2 (R. 119) was obtained by the State Capitol Building Company as shown by Exhibit 10 (R. 149).

These Capitol Building Grounds were transferred to the State of Oklahoma by the State Capitol Building Co., as shown by Exhibit 7 (R. 132) and Exhibit 8 (R. 141). The acceptance attached to each of these conveyances specifically recite Senate Joint Resolution No. 7, as authority for such acceptance. Those additional grounds involved herein taken by condemnation were taken under chapter 298, Session Laws of Oklahoma 1919, p. 435, which shows that such additional lands were taken to be held, used and devoted to the same purposes as the lands originally received.

The *State Capitol Building* was erected thereon—chapter 220, Session Laws of Oklahoma 1913, p. 584. *The Governor's Mansion* and *garage* were built on a portion thereof—chapter 67, Session Laws of Oklahoma 1927, p. 89. The *Power House* and *tunnel for the State Capitol Building* and *water reservoirs* were built on said lands—chapter 102, Session Laws of Oklahoma 1917, p. 155. The *University Hospital* and *Medical School* were established and erected thereon—chapter 170, Session Laws of Oklahoma 1917, p.

299; chapter 122, Session Laws of Oklahoma 1923-1924, p. 143; chapter 164, Session Laws of Oklahoma 1925, p. 261. *Paving and beautifying* the said *Capitol Building lands* was provided by the Legislature and carried out—chapter 298, Session Laws of Oklahoma 1919, p. 435; chapter 77, Session Laws of Oklahoma 1923-1924, p. 92. The Legislature created therein a *Capitol Improvement District* and *paved and lighted the area*—chapter 35, Session Laws of Oklahoma 1919, p. 57. *Nurses Home* was erected at the *University Hospital site*—chapter 233, Session Laws of Oklahoma 1921, p. 259. The *Oklahoma State Historical Society Building* was erected thereon—chapter 45, Session Laws of Oklahoma 1929, p. 57. The *Oklahoma Hospital for Crippled Children* was erected and completed thereon—chapter 19, Session Laws of Oklahoma 1927, p. 20. The *State Office Building* was provided for and erected upon said lands with money derived from the production of oil and gas by the state from these Capitol Building lands which were paid for a certain time into a Capitol Grounds Building Fund; and the *National Guard Armory* was located on said grounds and built from the same money—chapter 24, Articles 5, 22, and 23; Session Laws of Oklahoma 1936-1937, pp. 22, 86. The "Kessler Plan" for the improvement of these Capitol Building Grounds and approaches constantly referred to in the acts cited, was used in the improvements and buildings referred to.

The Capitol Grounds of which the lands herein are a part as heretofore shown, were authorized to be leased for oil and gas by the State Board of Public Affairs by Act of the Legislature of Oklahoma shown as chapter 20, Article 4, Session Laws of Oklahoma 1935, p. 22. All income derived was provided to be converted into the General Revenue Fund of the state.

However, the Legislature, by chapter 24, Article 5, Session Laws of Oklahoma 1936-1937, p. 22, provided that "The monies received as royalties, bonuses or rentals by the State Board of Public Affairs for the use and benefit of the State of Oklahoma not heretofore paid by said State Board of Public Affairs to the Treasurer to be converted into the General Revenue Fund and all royalties, bonuses, and rentals accruing to the state prior to January 1, 1939, from

any contracts or leases executed * * * and all other monies received from the sale of any such leases, bonuses, and royalties or other contracts so made by said State Board of Public Affairs prior to January 1, 1939, shall be paid by the said State Board of Public Affairs to the Treasurer of the State of Oklahoma and deposited in a fund to be known as the *'Capitol Grounds Building Fund'*; provided, however, that not more than the sum of One Million ($1,000,000.00) Dollars shall be paid into the Capitol Grounds Building Fund under the provisions of this act, and if that sum shall be received, paid into and deposited in said Capitol Grounds Building Fund prior to January 1, 1939, then all sums in excess of One Million ($1,000,000.00) Dollars shall be converted into the General Revenue Fund of the state. All revenues arising from said sources subsequent to January 1, 1939, shall be converted into the General Revenue Fund of the state."

By the same act, the Legislature provided (Section 2) that the monies of the State Capitol Grounds Building Fund should be expended "for the construction, erection, completion, equipment and furnishing of a State Office Building for the use and occupancy of officers and departments of the state government of the State of Oklahoma"; and provided (Section 6) that any remainder of said fund should "be expended * * * for the construction, erection, completion, equipment, and furnishing of a building for the use, occupancy, housing and quartering of the officers, personnel and equipment of the National Guard of the State of Oklahoma."

These buildings were erected upon the Capitol Ground lands as shown by Exhibits 1-2 (R. 119).

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 1188

SUNRAY OIL COMPANY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court of the United States (R. 100–105) are reported at 3 T. C. 251. The opinion of the Circuit Court of Appeals (R. 227–234) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 21, 1945 (R. 235), and a petition for rehearing (R. 239–259) was denied on March 16, 1945 (R. 261). The petition for a writ of certiorari was filed on April 21, 1945.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether overruled decisions of this Court grant the petitioner immunity from taxation on income from lands leased from a state, with respect to the period before the date of overruling.

2. Whether the petitioner's gross income may be reduced in the amounts of allocable portions of bonuses paid to obtain leases on oil and gas lands, in addition to the amounts allowed as percentage depletion under Section 114 (b) (3) of the Revenue Acts of 1936 and 1938 and of the Internal Revenue Code.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in the Appendix, *infra*, pp. 8–13.

STATEMENT

During 1936 and 1937, the petitioner purchased oil and gas leases upon lands owned by the State of Oklahoma for cash bonuses and promises to pay specified royalties from oil produced. In its returns the petitioner claimed that its income from these leases was exempt from federal taxation. (R. 101.) Portions of the bonuses paid for the leases obtained from the State, and certain other leases obtained from private persons,

may be allocated to the taxable years on the basis of estimated oil reserves and oil produced during the taxable years as follows (R. 102):

1936	$25,339.12
1937	54,474.06
1938	35,041.74
1939	29,622.61

The Tax Court and the court below held that the petitioner's income from the state leases was not immune from federal taxation. Both courts also held that, as the Commissioner had determined, the portions of the bonuses allocable to the products sold during the taxable years in question and excluded from the petitioner's gross income from the property for those years in computation of percentage depletion should be included in its gross income under Section 22 (a) of the Revenue Acts of 1936 and 1938. (R. 100–105, 227–234.)

ARGUMENT

1. The petitioner presents nothing warranting the issuance of a writ by its effort (Pet. 6–10) to have *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, and *Gillespie* v. *Oklahoma*, 257 U. S. 501, applied to sustain its claim to constitutional immunity from federal taxation of income during the period before those decisions were formally overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, on March 7, 1938. As this Court pointed out in its opinion in the latter case, the earlier cases relied on by the petitioner had been undermined by intervening decisions. Their over-

ruling did not mark a sudden change in the law, but rather the culmination of a long process of development. This Court applied its overruling decision to income of a period of prior years.

Further developments in the law of immunity from federal taxation of income were announced in *Helvering* v. *Therrell,* 303 U. S. 218; *Helvering* v. *Gerhardt,* 304 U. S. 405; and *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466. A petition for rehearing was filed in the *Gerhardt* case, asking that the decision be limited to prospective application. In his memorandum in reply, Solicitor General Jackson conceded that in appropriate circumstances this Court would have power so to limit a decision of its own. He concluded, however, that the *Gerhardt* case was an inappropriate one; and this Court denied the petition for rehearing (305 U. S. 669). Shortly thereafter, Congress expressly limited to the future the application of the *Gerhardt, Therrell* and *O'Keefe* cases. Section 203 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, 576.

Section 3791 (b) of the Internal Revenue Code (26 U. S. C., Sec. 3791) does confer upon administrative officials discretionary power to grant relief from the retrospective effects of judicial decisions. See *Helvering* v. *Griffiths,* 318 U. S. 371, note 49, p. 398. The Bureau of Internal Revenue expressly ruled, however, that the *Mountain Producers* case was to be applied to the period before the date of the opinion as well as

to the period thereafter. Mim. 4755, 1938–1 Cum. Bull. 179.

At least at this late date, the claim of the present petitioner for judicial relief is much weaker than that advanced in the *Gerhardt* case.

2. The court below decided that the petitioner was not entitled to exclude allocable amounts of bonus payments (advance royalties) from its gross income after taking depletion on the percentage basis provided by Section 114 (b) (3).[1] This was plainly correct.[2]

The amounts of the petitioner's receipts allocable to the bonus payments were part of its gross income under Section 22 (a), since they were received as its own without any obligation to pay them over to another. Any exclusion or deduction from income on account of the consumption of the petitioner's mineral interests is wholly a matter of legislative grace (*Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 366–367), and the petitioner has the burden of pointing to a provision of the statute conferring a right thereto in plain and unmistakable terms (*New Colonial Co.* v. *Helvering*, 292 U. S. 435, 441).

[1] References to sections are to sections of the Revenue Act of 1936 and corresponding provisions of later statutes; references to articles are to articles of Regulations 94 and corresponding provisions of subsequent Regulations. These are all set forth in the Appendix, *infra*, pp. 8–13.

[2] Cf. *Quintana Petroleum Co.* v. *Commissioner*, 44 B. T. A. 624, affirmed, 143 F. (2d) 588 (C. C. A. 5th); *Canadian River Gas Co.* v. *Higgins* (S. D. N. Y.), decided March 2, 1945 (1945 C. C. H., par. 9250).

A bonus payment is not part of the "cost of goods sold" within the meaning of Article 22 (a)–5. Such a construction would be quite inconsistent with the long-settled rule that gross income includes the entire selling price of oil. *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103. A bonus payment is "consideration for the lease" (*Burnet* v. *Harmel,* 287 U. S. 103, 112) which gives rise to a valuable right in the lessee to extract minerals and retain the proceeds thereof (*Douglas* v. *Commissioner,* 322 U. S. 275, 285–286), and hence constitutes a capital expenditure for purposes of the lessee (*Baton Coal Co.* v. *Commissioner,* 51 F. (2d) 469 (C. C. A. 3d), certiorari denied, 284 U. S. 674).

Had the petitioner taken depletion on the cost basis provided by Section 23 (m) and 114 (b) (1), it would have been allowed deductions in the amounts of the allocable portions of the bonus payments. It did not take depletion on this basis, however, but availed itself of the higher percentage allowance under Section 114 (b) (3). The petitioner's argument is essentially one that it is entitled to employ both methods at once and thus obtain a forbidden double deduction.

The provision of Article 23 (m)–1 (g) that allocable amounts of advance bonus payments are not included in "gross income from the property" as that term is used in Section 114 (b) (3), is required by the rule that percentage depletion is a single allowance which must be apportioned be-

tween the lessor and the lessee. Section 23 (m); *Helvering* v. *Twin Bell Syndicate,* 293 U. S. 312. Since the lessor is entitled to a percentage depletion allowance on the bonus payments (*Herring* v. *Commissioner,* 293 U. S. 322), it necessarily follows that the lessee is not. This rule, designed solely to prevent two taxpayers from securing allowances with respect to the same item of depletion, has no application to the question presented here.

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MAY 1945.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived * * * dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(e) *Determination of Gain or Loss.*—In the case of a sale or other disposition of property, the gain or loss shall be computed as provided in section 111.

* * * * *

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * * and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

* * * * *

(m) *Depletion.*—In the case of mines, oil and gas wells, * * * a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. In any case in which it is ascertained as a result of operations or of development work that the recoverable units are greater or less than the prior estimate thereof, then such prior estimate (but not the basis for depletion) shall be revised and the allowance under this subsection for subsequent taxable years shall be based upon such revised estimate. In the case of leases the deductions shall be equitably apportioned between the lessor and lessee. * * * (For percentage depletion allowable under this subsection, see section 114 (b), (3) and (4).)

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OF LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

* * * * *

SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Basis (Unadjusted) of Property.*—The basis of property shall be the cost of such property; except that—

* * * * *

(b) *Adjusted Basis.*—The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.

(1) *General Rule.*—Proper adjustment in respect of the property shall in all cases be made—

(A) for expenditures, receipts, losses, or other items, properly chargeable to capital account, * * *.

(B) in respect of any period since February 28, 1913, for exhaustion, wear and tear, obsolescence, amortization, and depletion, to the extent allowed (but not less than the amount allowable) under this Act or prior income tax laws. * * *

* * * * *

SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

(b) *Basis for Depletion.*—

(1) *General Rule.*—The basis upon which depletion is to be allowed in respect of any property shall be the adjusted basis provided in section 113 (b) for the purpose of determining the gain upon the sale or other disposition of such property, except as provided in paragraphs (2), (3), and (4) of this subsection.

* * * * *

(3) *Percentage Depletion for Oil and Gas Wells.*—In the case of oil and gas wells the allowance for depletion under section 23 (m) shall be 27½ per centum of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer

in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23 (m) be less than it would be if computed without reference to this paragraph.

* * * * *

Except that Section 22 (e) of the Revenue Act of 1936 became Section 22 (f) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and of the Internal Revenue Code (26 U. S. C., Sec. 22), the quoted provisions of the Revenue Act of 1936 are embodied in identical form in the Revenue Act of 1938 and in the Internal Revenue Code.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 22 (a)–5. *Gross income from business.*—In the case of a manufacturing, merchandising, or mining business "gross income" means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources. In determining the gross income subtractions should not be made for depreciation, depletion, selling expenses, or losses, or for items not ordinarily used in computing the cost of goods sold. But see article 23 (m)–1 (g).

* * * * *

ART. 23 (m)–1. *Depletion of mines, oil and gas wells, other natural deposits, and timber; depreciation of improvements.*—Section 23 (m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber,

a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under these provisions of the Act the owner of an interest in mineral deposits, mineral properties, or timber, whether freehold or leasehold, is allowed annual depletion and depreciation deductions which, in the aggregate, will return to him the cost or other basis of such property as provided in section 113, plus, in either case, subsequent allowable capital additions (see articles 23 (m)–15 and 23 (m)–16) with the following exceptions and qualifications:

(1) In the case of coal mines, metal mines, sulphur mines or deposits, and oil and gas wells the aggregate annual allowable deductions may, because of percentage depletion, ultimately exceed the cost or other basis;

* * * * *

(g) "Gross income from the property" as used in section 114 (b) (3) and (4) and articles 23 (m)–1 to 23 (m)–28, inclusive, means the amount for which the taxpayer sells (a) the crude mineral product of the property or (b) the product derived therefrom, * * *

* * * * *

In all cases there shall be excluded in determining the "gross income from the property" an amount equal to any rents or royalties which were paid or incurred by the taxpayer in respect of the property and are not otherwise excluded from the "gross income from the property." If royalties in the form of bonus payments or advanced royalties (see article 23 (m)–10) have been

paid in respect of the property in the taxable year or in prior years, the amount excluded from "gross income from the property" for the taxable year on account of such payments shall be an amount equal to that part of such payments which is allocable to the products sold during the taxable year.

* * * * *

Substantially identical provisions are embodied in Articles 22 (a)–5 and 23 (m)–1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938, and Sections 19.22 (a)–5 and 19.23 (m)–1 of Treasury Regulations 103, promulgated under the Internal Revenue Code. Subsection 23 (m)–1 (g) of the Regulations 94 and 101 became subsection 19.23 (m)–1 (f) of Regulations 103.

U. S. GOVERNMENT PRINTING OFFICE: 1949